SUPREME COURT, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 75-1874

DAVID L. JONES, SECRETARY OF THE
NORTH CAROLINA DEPARTMENT OF CORRECTIONS,
RALPH EDWARDS, COMMISSIONER OF THE
NORTH CAROLINA DEPARTMENT OF CORRECTIONS,
Appellants,

v.

NORTH CAROLINA PRISONERS' LABOR UNION,
INC., ON BEHALF OF ITSELF AND ALL ITS MEMBERS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF AMICUS CURIAE

The Prisoners' Union, Inc.
Michael R. Snedeker
539 Clayton Street
San Francisco,
California 94117

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INDEX

Table of Citations	ii
Statement of Interest	1
Argument	4

TABLE OF CITATIONS

CASES:	PAGE:
Brown v. McGinnis, 225 NYS 2d 497	7
Cooper v. Pate (1964) 378 U.S. 546	5
Cooper v. Pate (1967) 382 F.2d 518	6
Fulwood v. Clemer (1962) 206 F.Supp 370	5
In Re Ferguson (1961) 55 C.2d 663	5
Johnson v. Avery (1969) 393 U.S. 483	6
Knuckles v. Prasse (1969) 302 F. Supp 1036	6
Long v. Parker (1968) 390 F.2d 816	6,7
Marion v. McGinnis (1970) 314 NYS 2d 715	6
Northern v. Nelson (1970) 315 F.Supp. 687	6,7
State ex. rel. Tate v. Cubbage (1965) 210 A. 2d 555	7
Walker v. Blackwell (1969) 411 F.2d 23	6
Wilson v. Prasse (1972) 463 F.2d 1091	6

OTHER AUTHORITIES	PAGE
Specter, A Prison LIbrarian Looks at Writ-Writing, 56 Calif.2 Rev. 365 (1968	8
AMERICAN BAR ASSOCIATION Joint Committee on teh Legal Status of Prisoners, Proposed Standards Relating to the Legal Status of Prisoners, §6.4 Freedom of Association (1976)	9
National Advisory Commission on Correctional Standards and Goals, Corrections, Jan 23,1973, p. 58.	10
Center for the Study of Criminal Justice, Boston University, Model Rules and Regulations in Priosner Rights and REsponsibilities, 1973, p. 28.	10
Keve, Prison Live and Human Worth (1974).	10

STATEMENT OF INTEREST

The Prisoners Union, Inc. hereby respectfully moves for leave to file a brief amicus curiae in support of the appellees, as provided in Rule 42 of the Rules of the Court.

The Prisoners Union is a non-profit, tax-exempt organization incorporated under the laws of the State of California in 1971. It is dedicated to the vigorous, non-violent, imaginative use of every avenue our political system affords to achieve its goals of a uniform and equitable sentencing structure, the restoration of civil and human rights to prisoners, improved working conditions inside prisons, and representation for prisoners in those forums where decisions affecting their lives are made. Its activities in furtherance of these ends have included the sponsorship of seminars on the criminal justice system, regular testimony before legislative committees in California and other states, frequent meetings with prison officials, lawsuits against prison officials, stimulating and responding to the media, appearing before high school, undergraduate, graduate, and law shcool classes and community groups, and publishing a journal, The Outlaw. As of December, 1976, just under 30,000 prisoners around the country and over 100 libraries have subscribed to the Prisoners Union's publication. More than 20,000 prisoners have expressed a desire to become members of the Prisoners Union. It is the oldest and largest organization of its kind in the United States.

Since its inception over five years ago, many of the goals of the Prisoners Union have been achieved; the abolition of the Indeterminate Sentence law in California and the restoration of a variety of civil and human rights to prisoners are examples. Other goals, such as the payment of a minimum or prevailing wage to prisoners for work done or a formal bargaining structure between prison staff and convicts, can only occur through legislative action or administrative policy changes. Between these two groupings are rights to which prisoners are lawfully entitled but which have not been effectively recognized. The most important of these are at issue in the present case.

The Prisoners Union believes that it is essential for prisoners to form a unified organization that functions in a sustained, responsible manner if they are to change present stereotypes of prisoners that make for bad prison policies, and if they are to effectively use the present system to vindicate rights to which they are lawfully entitled. The Prisoners Union further believes that the right of association with other members of the Prisoners Union both inside and outside prison is one of the most precious available to them, because only such participation would make possible the achievement of these goals.

Accordingly, the Prisoners Union has pending in the Superior Court of Monterey County of the State of California a lawsuit filed on behalf of its members in Soledad prison that seeks similar relief to that granted appellees in the court below. The facts are also similar. In California as in North Carolina, prison officials have recognized the right of prisoners to be members of the organization in question. Each organization has a prior existence both inside and outside the prison, a record of positions and actions capable of scrutiny. Whatever decision is reached in this Court will have immediate and profound impact on the Prisoners Union.

The leading issue in the present case is not whether constitutional rights extend to prisoners, but whether legitimate governmental interests, primarily the security of the institution, supercede the exercise of such rights. Appellees will necessarily concentrate on the facts of their particular case. The Prisoners Union wishes to address one point of a wider scope.

Over the last fifteen years or so, the right of prisoners to meet together has been recognized in a variety of contexts despite conclusory predictions by prison officials that violence and disorder would be the likely result. Subsequent history has shown

their predictions to have been without merit; in fact, many prison officials have since admitted that the exercise of these disputed rights has had a generally stabilizing effect on prison order. It is no longer possible to arrive at a realistic evaluation of the credibility of conclusory speculations about threats to prison security without considering this history.

ARGUMENT

THE RIGHT OF PRISONERS TO MEET TOGETHER HAS BEEN RECOGNIZED IN A VARIETY OF CONTEXTS DESPITE CONCLUSORY PREDICTIONS BY PRISON OFFICIALS OF VIOLENCE AND DISORDER; SUBSEQUENT PRACTICE HAS SHOWN THESE PREDICTIONS TO HAVE BEEN WITHOUT MERIT

The opinions and conclusions of prison officials have traditionally been deferred to by both state and federal judges wherever the questions of prisoners rights have been presented to the Court. In recent years, however, there have been occasions when: (a) prisoners have sought to associate with each other in pursuance of rights guaranteed them by the Constitution; (b) prison officials have charged that riots and disorder, or exploitation and manipulation resulting in violence, would be the likely result of recognizing these rights; (c) Judges, following the rationale developed above, have refused to allow officials to impede these rights based merely on official's speculation of disturbance; (d) subsequent history has shown the correctional officials to have been wrong in their fears; in fact, many have since admitted that the exercise of these disputed rights has had a

generally stabilizing effect on prison order, contrary to their earlier predictions.

1. Religious Association

The Nation of Islam, more commonly known as the Black Muslims, or Muslims, spread rapidly through prisons across America in the 1950's and 60's. It was resisted by prison officials, who generally perceived this religion as a dangerous cult of hate, led by ex-convicts, that would lead to racial strife and violence if allowed to promulgate its doctrines in an organized way. The Muslims commenced litigation in an effort to establish their right to worship inside prison; lower courts, uncertain as to how far the Constitution reached inside prison, came to contradictory results (e.g., In re Ferguson (1961) 55 C.2d 663), declined to overrule punitive actions of prison staff and the Director of Corrections, including the Director's refusal to grant "religious" status to Muslims; Fulwood v. Clemer (1962) 206 F. Supp 370, held that "the Muslim faith is a 'religion' within constitutional privions as to freedom of religion; and required the Commission of the District of Columbia to make facilities available to the Muslims equal in every respect to other religions.

Finally the U.S. Supreme Court, in a short per curiam opinion, Cooper v. Pate (1964) 378 U.S. 546, noting that "no state

or municipal government entity has refused to recognize the status of the Black Muslims as a religious movement or declined to allow or urge the normal tax exempt status afforded to churches or parochial schools", held that the Muslims were a religion, and further held that plaintiff, a prisoner, was able to state a claim for infringement of rights under the Civil Rights Act (42 U.S.C. §1983).

Thereafter, with these questions settled, lower courts turned their attention to the regulation of time, place, and manner of religious practice. The right of the Muslims to communally worship has in large part been recognized, generally to the same extent it is extended to other religious faiths. Northern v. Nelson (1970) 315 F. Supp. 687, Walker v. Blackwell (1969) 411 F.2d 23, Long v. Parker (1968) 390 F. 2d 816, Wilson v. Prasse (1972) 463 F. 2d 1091, Marion v. McGinnis (1970) 314 NYS 2d 715, Cooper v. Pate (1967) 382 F.2d 518.

In defining the terms of the right to hold communal worship services, some courts have been quite specific, Knuckles v. Prasse (1969) 302 F. Supp. 1036, Northern v. Nelson, supra; while others have been more general, by assuring the right to services "at reasonable times and places", Sewell v. Pegelow, supra. The most widely used statements are those that Muslims are to be afforded worship services and facilities comparable to those afforded other religious sects within the prison in question.

The question of when prison officials are warranted in suspending the right of Muslims to communally worship has also been considered. Some courts have held that restrictions may be imposed only if breaches of security in fact occur; that prior restraints based on an alleged clear and present danger will not support a ban on the holding of services. State ex. rel. Tate v. Cubbage (1965) 210 A. 2d 555, Brown v. McGinnis, 225 NYS 2d 497. Others have permitted prior restraints if there is a factual showing of clear and present danger to prison security. Long v. Parker (1968) 390 F. 2d 816. No court has allowed conclusory allegations of a threat to prison security or administrative inconvenience to justify infringement of the Muslim's right to communally meet.

The days of punishment and isolation of prisoners for attempting to worship as Muslims are now over; the Nation of Islam is a fact of life in prisons around the country. In San Quentin state prison, where six years ago prison officials were compelled by court to allow Muslims to practice their religion (Northern v. Nelson, supra), a Muhammed Appreciation Day was held on August 28, 1976. There were many speakers from both inside and outside San Quentin; among them was Associate Warden Swagerty. Mr. Swagerty read a proclamation from Warden Robert M. Rees which commended the Muslims for "uplifting the moral character" of the institution by producing desire to attain dignity and self-respect while accomplishing positive goals." (San Quentin News, September 3,1976).

The emphasis placed by the Nation of Islam on self-reliance is now widely perceived as no threat, but rather a rehabilitative effort that is essential if prisoners are to break free of the passive cycle of crime and punishment.

2. Legal Association

Because the law is complex and forbidding to those who are illiterate, poorly educated, or unfamiliar with its ways, prisoners have often looked to each other for assistance. This mutual aid was generally banned by prison officials on grounds that the practice led to coercion and intimidation, and threatened prison security.[1]

A regulation banning such assistance in the State of Tennessee was struck down by the U.S. Supreme Court in Johnson v. Avery (1969) 393 U.S. 483. The Court noted that prison "writ writers" are sometimes a menace to prison discipline; but, absent an available alternative, if many prisoners could not have such assistance, their possibly valid constitutional claims would never be heard in any court. The regulation, therefore, interferred with the paramount right of prisoners to have access to the Courts, and was invalidated. 393 U.S., at 487.

[1]See e.g., Specter, A Prison Librarian Looks at Writ-Writing, 56 Calif. 2 Rev. 365 (1968).

Johnson v. Avery was decided on February 24, 1969. Less than a month after the decision was rendered, California prison officials wholly revised their longstanding regulations flatly prohibiting mutual assistance.

Five years later California correctional officials were pleased about the change they had earlier strongly opposed. Nelson Kempsky, Counsel to the Department, was quoted in a newspaper article about jailhouse lawyers as follows: "(Mutual legal assistance) is now out in the open where the prison administration can see it and get a handle on it, instead of being secretive and behind the back door. The problems which the Department feared simply have not materialized in practice. What we have done is to institutionalize the system of jailhouse lawyers and it has worked pretty well." (Sacramento Bee, July 17, 1974)

3. Political Association

The right of association for prisoners is not a dramatic departure from well-considered opinion on the proper development of our criminal justice system. It has been included in the recommendations and standards of such respected groups as The American Bar Association Committee on the Legal Status of Prisoners,[2] the National Advisory Commission

[2]Proposed standards relating to the legal status of prisoners, American Bar Association Join Committee on the Legal Status of Prisoners, 1976, §6.4 Freedom of Association.

on Criminal Justice Standards and Goals,[3] the Center for Criminal Justice at the Boston University School of Law[4] and the Standard Minimum Rules for the Treatment of Prisoners of the Department of Economic and Social Affairs of the United Nations.

Even among correctional officials there are some who favor the concept of prisoners organizations. Paul W. Keve, formerly Commissioner of Corrections for Minnesota and now Director of Adult Corrections for the State of Delaware, endorses the establishment of prisoner organizations in his book Prison Life and Human Worth.[5]

His reasoning is primarily that the responsibility involved in maintaining an organization and negotiating with people who have different interests (as must be done by free citizens every day), and the increased communication made possible by an organization, is of considerable benefit to prisoners, staff and the larger society. He is quoted by the Court in the opinion below, as stating that in his own institution there is a union by the name of Prisoner Action Committee, "which Keve thinks has in no way endangered the security of the correction system and has sometimes helped management of the prison materially."

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[3]Corrections, National Advisory Commission on Correctional Standards and Goals, Jan. 23, 1973, p. 58

[4]Model Rules and Regulations in Prisoner Rights and Responsibilities, Center for the Study of Criminal Justice, Boston University, 1973, p. 28.

[5]P. Keve, Prison Life and Human Worth (1974).

Director Keve's remarks about the process of change within prison are worth quoting at length.

> The fascinating thing to me is that over the nearly thirty-five years now that I've been in the business, I have seen remarkable changes come about. And I'm sure that probably in every prison in the country there are a few people around that have been working there for years, twenty years or so, who are doing things today, following procedures today and practices with equanimity and serenity that they would not believed possible when they started work there.
>
> I remember when I first heard a man in a juvenile training school say we're thinking of stopping the censorship of mail, and it was a breathtaking position to take at the time, and it's not too many years ago.
>
> Here's an institution full of little boys and I've worked in one myself years ago, and it was just taken for granted that you have to censor every letter coming in and going out. And up to ten years ago most institutions would have taken this for granted. About four or five years ago when I first proposed to my wardens in the Minnesota prisons that we think about backing off from our strict censorship of every letter going in and out, I shook them up considerably. They couldn't take it and we had to go very slow on that, because they just did not

grasp the idea at that point that you can operate a prison without censoring every piece that goes in or out.

And now there's thousands of prison people who ten years ago wouldn't believe that you could operate without censorship and are operating every day with no censorship and have forgotten that a few years ago they couldn't have believed it. There are all kinds of changes of this sort that are coming very, very rapidly.

And I think there's very little difference between some of those things and the business of prisoner organizations. I would just predict that in another twenty years we will look back at it and say what was all the shouting about?

CONCLUSION

Petitioners do not dispute that prisoners' rights may be infringed if their exercise would threaten the reasonable security of the institution or the protection of the public. However, Petitioners strongly dispute the denial of fundamental rights based on talismanic utterance of a pat formula of words unsupported by specific facts. The right of association is a fundamental aspect of the freedom of expression guaranteed by the First Amendment to the United States Constitution.

Our Constitution and the relevant decisional law do not permit conclusory, unsubstantiated speculations that a legitimate governmental interest is endangered to override the fundamental rights of anybody, including prisoners. Recent history teaches us that when courts have not allowed similar speculative fears of prison officials to prevent prisoners from associating, the predictions of violence and disorder did not materialize.

In the present case, there is no justification for fears that allowing members of the Union to meet with outside members and guests present would threaten the reasonable security of the institution. The prisoners Union in North Carolina, like that in California has an extensive history of activity and presence inside the prison system, and no record whatsoever of having been any threat to the reasonable security of any institution. The goals set forth in the proposed charters and by-laws are not the goals of any other inmate activity group, nor could they be effectively approximated by any group other than the Prisoners Union.

We respectfully urge affirmance of the decision of the District Court.

RESPECTFULLY SUBMITTED,

Michael R. Snedeker